NSTB Order No.
EM-73

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 9th day of February 1979.

OWEN W. SILER, Commandant, UNITED STATES COAST GUARD,

vs.

VICTOR V. COLEMAN Appellant.

Docket ME-71

OPINION AND ORDER

Appellant is seeking review of the Commandant's decision[1] affirming a suspension of his chief engineer's license (No. 429660) for negligence while serving in that capacity on the SS AMERICAN EAGLE, a United States tanker vessel.[2]

The appeal to the Commandant (Appeal No. 2100) was taken from an initial decision issued by Administrative Law Judge Thomas McElligott, following a full evidentiary hearing.[3] Throughout the proceedings herein, appellant has been represented by counsel.

The law judge found that on February 19, 1976, appellant was in charge of loading 4800 barrels of bunker fuel aboard the vessel at the Coastal States Petrochemical Company dock in Corpus Christi harbor, Nueces County, Texas; and that in the course of this operation he left the port and starboard settling tanks unattended when they were about to "top off" for a period of 5 or 6 minutes, by which time the starboard settler had overflowed causing spillage of approximately 2 barrels of fuel oil into the harbor. In concluding that "there was some negligence on [appellant's] part... contributing to the spill in question" (I.D. 9), the law judge

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[1]Admiral J.B. Hayes has now succeeded Admiral Owen W. Siler as Commandant.

[2]Review of the Commandant's decision on appeal to this Board is authorized by 49 U.S.C. 1903(a)(9)(B).

[3]Copies of the decisions of the Commandant and the law judge are attached.

suspended his license for 1 month and added a probationary suspension of 2 months.[4] This order was then affirmed by the Commandant.

Appellant contends in his brief that the Coast Guard's pleading was defective, and that the finding as to his negligence is not supported by the evidence. He requests a reversal of the initial decision or "such other and further relief to which he may be entitled." Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we conclude that the findings of the law judge are supported by reliable, probative, and substantial evidence. Those findings, unless modified herein, are adopted as our own. We further conclude, however, that the law judge misclassified the offense in view of his findings, and that a reduction of the sanction imposed by him is warranted.

Appellant's procedural argument is that he was not fully apprised of the acts or omissions charged against him. The specification of the charge in this instance set forth the date and place of the oil spill, and alleged that it had resulted from his neglect of duty in "allowing the starboard settling tank to overflow." The fact that he was supervising the loading of bunkers at the time was included in the Coast Guard's opening statement. Moreover, the hearing was continued for 2 months after the first witness had been called by the Coast Guard. This was testimony by a crewmember to the effect that the appellant, working alone, had been "checking his tanks up forward" just before the settler in the aft section near the pumproom began spilling oil onto the deck and over the side (Tr. 48-51). By then, at least, appellant was informed of the specific offense charged, namely, leaving his proper post at a critical stage of the bunkering operation.[5] With 2 months thereafter in which to prepare a defense, we fail to see how he was prejudiced in litigating this issue on the merits. We therefore find no fatal deficiency in the coast Guard's pleading. It is well settled that the notice giving function of pleadings is fulfilled "if there has been actual notice and adequate opportunity

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[4]The sanction is stayed pending disposition of this appeal. See 46 CFR 5.30-35(d); 43 Fed. Reg. 6778-9, February 16, 1978.

[5]Another seaman and the night mate were also aboard (Tr. 70), raising a subsidiary issue of appellant's failure to send someone else forward while he continued to monitor the aft settlers.

to cure surprise."[6]

Neither of the Coast Guard's remaining witnesses had personal knowledge of appellant's actions prior to the spill. The dockman heard a splashing sound while eating his supper in the dock office and observed that black oil was running down the vessel's side. He testified that it took him 30 seconds to cut off the flow of oil at the shore valve. A pollution investigator of the Coast Guard, arriving soon afterwards, took photographs of the spill in the immediate are that were received in evidence. He also testified that it had a "definite rainbow sheen" on the water, which he had traced to a point across the channel (Tr.87).[7]

Appellant's substantive argument is that the coast Guard failed to establish, through its witnesses, the standard of care required in such an operation. That finding must be based on the whole record. The witnesses' testimony was sufficient for a prima facie case, showing the breach of appellant's supervisory duties resulting in pollution damage.[8] He testified in rebuttal that both the rate of flow given him at the dock facility and his monitoring of the aft settlers indicated that there was time, before these tanks topped off, to sound the No. 2 deep port tank in the forward section, where he intended to transfer the flow after filling the settlers. He attributed the spill his absence to fluctuations in the supply line. This was pure conjecture and cross-examination disclosed his failure to make accurate measurements of the loading rate.

During the first 20 minutes appellant was loading the aft settler and wing tanks together with the No.2 forward tank, until the flow rate had stabilized. Then he closed off all tanks except the settlers. In an hour's time thereafter, while filling only the

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[6]Kuhn v. Civil Aeronautics Board, 183 F. 2d 839, 842 (D.C. Cir. 1950); Commandant v. Sabo, 2 N.T.S.B. 2811 (1976); 1 Davis, Administrative Law Treatise, §8.04.

[7]His estimate that 50 to 75 barrels of oil had accumulated in that area was not used by the law judge in determining the amount spilled from the AMERICAN EAGLE. Moreover, the investigator conceded that he had no way of telling how much would have come from that vessel (Tr.90).

[8]For purposes of regulating against harmful discharges of oil under the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(3)), Coast Guard regulation 40 U.S.C. §110.3(b) includes those which "Cause a film or sheen upon ... the surface of the water or adjoining shorelines...."

settlers, he made no effort to estimate the rate at which the oil levels were rising in those tanks, and relied on visual sightings with a flashlight instead of using his tape to measure ullages. This evinces a failure of due care. His explanation that the loadingrate is "something that you have experience about...something you have a feeling for" (Tr.157) lacks substance, since he testified that it varies at different bunkering stations and could not recall loading fuel at this facility on any previous occasion (Tr.159,163,166). It would not be accepted in any event. No amount of experience can excuse lax practices by a licensed officer in maritime operations.[9] Without timing the flow rate and with only 3 1/2 or 4 feet "to go in the settling tanks, as he testified (Tr. 142), appellant had no reasonable basis to assume they would not top off in his absence. Indeed, at that stage, he should have remained at his post to guard against possible surges or fluctuations as they were nearing the point of topping off. In our view, his actions clearly deviated from the standard of care expected of a licensed chief engineer, or what a person of that station should have done under the same circumstances. Appellant's contention to the contrary is rejected.

In assessing sanction, however, we find that the law judge failed to accord proper weight to factors in mitigation. It is undisputed that the Coast Guard was notified of the spill "almost immediately" (Tr. 98-9), and the law judge found that appellant had worked "quickly and effectively to help limit the amount of the spill as soon as it was discovered..." (I.D. 10). In addition, the law judge reviewed appellant's Coast Guard record which showed no previous offense committed by him in a 32-year career both as a merchant seaman and ship's officer. The Coast Guard's scale of average orders indicates that first offenders should be given an admonition rather than a suspension for acts of negligence which may by classified as inattention to duty or failure to perform duty.[10] Where, as here, the first offender has performed in a commendable manner to minimize the damage, and in view of the relatively small amount of pollution found in this case, we believe that admonition will serve the purposes of a remedial sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as

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[9]In an analogous context we held that a navigator's "mere familiarity with certain waters is not a valid reason for abandoning basic rules of good seamanship." Commandant v. Buffington, NTSB Order No. EM-57, adopted February 11, 1977.

[10]46 CFR §5.20-165, Group A.

modification of the Commandant's order is provided for herein; and

2. The order suspending appellant's license for 1 month and for 2 additional months on 4 months' probation, affirmed by the Commandant, be and it hereby is vacated and in lieu thereof an admonition is hereby entered against the appellant for inattention to duty.[11]

KING, Chairman, DRIVER-Vice Chairman, McADAMS, and HOGUE, Members of Board, concurred in the above opinion and order.

[11]46 CFR 5.05-20(a)(2) states that this offense and negligence are "essentially the same and cover both the aspects of misfeasance and nonfeasance." See Commandant's decision on Appeal No. 2022 (Palmer).